No. 16,183

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE OLSHAUSEN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF.

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
Petitioner.

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COMMISSIONER OF INTERNAL REVENUE,	*Respondent.*

PETITIONER'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is a petition to review a decision of the Tax Court of the United States.

The petitioner is an individual, a resident of San Francisco who at all times mentioned filed individual income tax returns at the San Francisco office of the Commissioner of Internal Revenue. (R. 17.) The hearing before the Tax Court was held in San Francisco. (R. 18.) The proceedings were held pursuant to a 90-day letter issued by the district director of the San Francisco office of the Commissioner of Internal Revenue (R. 6-9), a petition for redetermination by the taxpayer (R. 3-9); answer thereto by the Commissioner of Internal Revenue (R. 9-10), three

amendments to the petition with the answers to each. (R. 10-16.)

The findings of fact and opinion of the Tax Court were rendered May 13, 1958 (R. 52-59); the decision on May 16, 1958. (R. 59.) The petition for review and statement of points relied on were filed on August 6, 1958. (R. 60-68; date given on R. 68.)

The Tax Court had jurisdiction under 26 USC 7451, 7453, Tax Court Rule 7 (26 USC following sec. 7453). The Court of Appeals of the Ninth Circuit has jurisdiction under 28 USC 7482, 7483.

STATEMENT OF FACTS.

The entire record (apart from exhibits sent up as originals) comprises only 72 pages.

The deficiency notice claims for "additions" to the tax for the years 1952 and 1953, under 1939 Code, 26 USC 294(d)(1)(A) and 294(d)(2). (R. 7-9.) Sec. 294(d)(1)(A) imposes an "addition" to the tax for failure to file an estimated tax return; sec. 294(d)(2) imposes a different "addition" for substantial underestimation.

Section 294(d)(1)(A) does not impose any additions where nonfiling was "due to reasonable cause and not to willful neglect". Section 294(d)(2) allows no exceptions in the event of "substantial underestimation".

The deficiency notice describes the "additions" as "penalties." (R. 6 ft.—"1952 Income Tax Penalties" —"1953 Income Tax Penalties".)

There is no claim for any deficiency in the tax itself.

R 7-8:

"Year: 1952—net income as shown on the return —*unchanged* . . .

* * * * * * * *

"Tax liability as shown on the return account No. AP5210, San Francisco District—*unchanged* . . ."

* * * * * * * *

"Year: 1953—net income as shown on the return —*unchanged* . . ."

"Tax liability as shown on the return Account NO. AP35226, San Francisco District—*unchanged* . . ." (Italics added.)

The years 1952 and 1953 were the *last two years* of a *nine or ten year period,* during all of which petitioner had, *without any objection from the respondent* filed only Forms 1040, without filing any Estimated Tax returns. All of these returns on Form 1040 showed on their face that no estimated tax return had been filed. (See Stipulation as to Facts, R. 16-18; Findings, R. 53.)

Instructions pamphlets accompanying Form 1040 were introduced for the years 1948-1950 both inclusive. (Exhibit No. 6, R. 37.) Before the trial petitioner had attempted to secure even earlier pamphlets, but the Commissioner destroys all which antedate the statute of limitations. (See Exhibit 10, R. 49-51.)

Of the pamphlets introduced in evidence *neither the one for 1948 nor the one for 1949 says that both Form 1040 and the estimated tax return has to be filed.*

Petitioner testified that this was true also of still earlier pamphlets.

> R. 43 "A . . . I do know this: This is included in the exhibits which have been introduced; that the reference books before 1950 do not say that you have to file both forms".

The Tax Court made no finding on this point. (Findings, R. 53-55.)

The instructions pamphlet for the taxable year 1950 (issued in 1951) was *the first instructions pamphlet which stated that both forms had to be filed* (Form 1040 and the estimated tax return). (See Exhibit 6, R. 37.) (Unless we assume vacillations on the Commissioner's part—*See infra.*)

In the meantime, however, on March 13, 1950, the Commissioner's office issued a press release, stating that both forms had to be filed. (Exhibit 2, R. 46-48.) Petitioner did not know of the existence of this press release until it was mentioned by revenue agents in conference in 1955. (Findings, R. 54.) The press release was apparently an attempt to *amend the instructions pamphlets through the newspapers.*

While over an eight or nine year period the Commissioner never once objected to the non-filing of estimated tax returns, corrections were made from time to time (and promptly) of minutiae in petitioner's returns. Thus, in 1952, within a few months after the filing of the return for the year 1951, the Commissioner caught a mathematical error of $10.25. (Exhibit 3, R. 35.) There were some similar bills at other

times and once a $300 refund. (Findings, R. 53; R. 33.)

Upon these facts, the Tax Court found that "petitioner has not carried the burden of showing that his failure to file declarations of estimated tax in the taxable years 1952 and 1953 was due to reasonable cause . . ." (R. 52, 54-55.) It affirmed the assessment of cumulative penalties under both sec. 294(d)(1)(A) and 294 (d)(2). (R. 59.)

The petition for review to the Court of Appeals and statement of points to be relied on, is to be found at R. 60-68.

The contentions raised may be summarized as follows:

1. a. Where as here, no deficiency is claimed in the tax itself, the deficiency notice procedure cannot be used to enforce claims for the "additions" ("penalties") under sec. 294(d) of the 1939 Code;

b. If the deficiency notice procedure were applied to such claims, it would raise serious constitutional questions in each of the following respects:

(1) Denial of due process of law under the Vth Amendment in that the burden of proof is inverted under Tax Court rule 32, especially after a finding of fault by the same executive officer who has the obligation to find and collect revenue;

(2) Denial of jury trial in violation of the VIIth (or perhaps the VIth) amendment;

2. The record does not show "wilful neglect" either as a matter of law or as a matter of fact;

3. Since the government has destroyed relevant evidence as too old, the government's claim is barred by laches; enforcement under these circumstances would amount to taking of property without due process, in violation of the Vth Amendment;

4. The provisions of Sec. 294(d)(1)(A) and 294 (d)(2) are not cumulative; in a case of non-filing, the section on non-filing (294(d)(1)(A)) is the only one which is pertinent.

5. If the government had acted immediately, it would have collected on earlier years which were much lower than those involved, particularly than 1952; the government cannot consistently with due process under the Vth Amendment, increase its claim by its own delay; its recovery here is limited at most to what the government could have gotten (assuming it could get anything) by acting promptly, to-wit $48.97.

Further details will be stated where necessary in connection with the argument.

We take the above points in order.

I. THE PRESENT CLAIM CANNOT BE ENFORCED BY DEFICIENCY NOTICE PROCEDURE.

Point "(1)" in petition for review, and "1" in statement of points on which petitioner intends to rely:

> R. 63-4 "(1) That the literal meaning of sections 294 and 271 and 272, of the Internal Revenue Code of 1939 (re-enacted in the Code of 1954) does not extend the deficiency notice pro-

cedure to claims for 'additions' under section 294 where there is no claim of deficiency in the tax itself; that such literal construction avoids constitutional issues;

(2) that any other construction of said sections 271, 272, and 294 of the Internal (sic) Code of 1939 would be a violation of petitioner's constitutional rights in that it would deny a jury trial in violation of the VIIth (or perhaps the VIth) Amendment to the United States Constitution in denying a jury trial upon the trial of a claim for money based upon alleged fault; and that application of the inverted burden of proof under Rule 32 of the Tax Court applied to such a claim deprives petitioner of property without due process of law in violation of the Vth Amendment to the United States Constitution;''

These two points are repeated in *statement of points on which petitioner intends to rely,* R. 66-7.

Since the deficiency notice does not claim any tax deficiencies but only additions (''penalties'') under sec. 294 of the 1939 Code, it does not set forth facts sufficient to sustain a liability. If the government has any claim for penalties or other additions (which we do not admit) such claim may be enforced only by different procedure (probably an action in the District Court). This follows both from the language of the statute, and because a contrary interpretation would raise serious questions of constitutional law, which are to be avoided.

This defense is raised by the third amendment to the petition. (R. 14-15.)

A. STATUTES DO NOT MAKE DEFICIENCY NOTICE APPLICABLE WHERE NO TAX DEFICIENCY CLAIMED.

Since the years in question are 1952 and 1953, the case is governed by the 1939 Code. We shall show, however, that the same result follows if the 1954 Code is held to govern procedural matters.

1. Deficiency Notice Unavailable Under 1939 Code.

The availability of the deficiency notice procedure depends, *first,* upon the section defining the payments claimed in the present proceeding, and *second* the sections setting forth the circumstances under which a deficiency notice may be used.

a. Nature of Claims.

As the 90 day notice (Pet. Ex. 1) shows, the claims are *entirely* under sec. 294(d)(1)(A) and sec. 294 (d)(2).

Sec. 294(d)(1)(A) covers alleged failure to file a declaration of estimated tax and provides that in case of failure to make and file a declaration of estimated tax—*there shall be added to the tax* 5 per centum of each installment due . . ." (Emphasis added.)

Sec. 294(d)(2) covers substantial underestimate of estimated tax, and provides that in case of substantial underestimation *"there shall be added to the tax* an amount equal to such excess or equal to 6 per centum of the amount" . . . , etc. These "additions" *are not part of the tax itself.* This is clear not only from the language of the quoted subsections, but also from the use of *different* language in other parts of section 294.

Thus Sec. 294(a)(1) states the "general rule" to be that if the tax or any part thereof is not paid on time "there shall be collected *as part of the tax* interest upon such unpaid amount at the rate of 6 per centum per annum . . ." (Emphasis added.)

This shows that the words in Sec. 4 are carefully chosen: the interest in subd. 294(a)(1) is part of the tax; the "additions" in subd. 294(d)(1)(A) and 294 (d)(2) are *not part of the tax.* A proceeding to collect these "additions" is *not* a proceeding to enforce payment of any tax.

b. History of Statutes and Language of Other Sections Supports Same Conclusion.

Both the history of the provisions contained in 1939 Code Sec. 294 and the contrast between the provisions of sections 294 and 293 indicate that the "additions" under section 294 were intended neither to be part of the tax nor to be enforced as part of the tax.

(1) History of Antecedents of 1939 Code, Section 294.

In both the Revenue Acts of 1918 and 1921 it was provided that the additions for non-filing of returns should be collected *as part of the tax.*

This is pointed out and applied in the cases of *Ely & Walker v. U.S.,* 34 F. 2d 429 (act of 1918) and *Schneider v. U.S.,* 119 F. 2d 215 (act of 1921).

In the *Ely & Walker case v. U.S.,* the court quoted, 34 F. 2d 429, 430:

> " 'If the under statement is false or fraudulent with intent to evade the tax, then, in lieu of the penalty provided by section 3176 of the Revised

> Statutes, as amended, for false or fraudulent returns, willfully made, but in addition to other penalties provided by law for false or fraudulent returns, *there shall be added as part of the tax fifty per centum of the deficiency* (Italics ours).' "

In *Schneider v. U.S.,* 119 F. 2d 215, 217, it was said:

> "Under § 250 (b) of the Revenue Act of 1921, 42 Stat. 227, 264, C. 136, which governs the taxpayer's liability for the tax deficiency and penalty assessed, the penalty was added 'as part of the tax'."

In short, this device was familiar at the time that Sec. 294 was enacted. But in Sec. 294 it was carried over only for the 6% interest for delayed payment (Sec. 294(a)(1)) *but not for the "additions" in 294 (d).* The history of the tax law therefore corroborates the conclusion to be drawn from the section itself: *the "additions" under Sec. 294(d) are not meant to be a tax.*

(2) Contrast Between Language of 1939 Code Sections 293 and 294(d).

The conclusion that the "additions" under Sec. 294 (d) are not a tax *and are not intended to be enforced as a tax,* is further corroborated by contrasting the language of Sec. 293 with that of 294(d).

Sec. 293(a) of the 1939 Code, dealing with negligence penalties, provides that in case of negligence:

> " . . . 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, *collected,* and paid *in the same manner as if it were a deficiency . . .*"

This approaches the same problem from the other end. The earlier statutes made the substantive provision that such penalties *should be part of the tax;* Section 293 makes the *procedural* provision that the 5% "addition" shall be enforced "in the same manner *as if it were* a deficiency". This indicates *first* that as a matter of substantive law *the additions are not deficiencies; second,* that when Congress intended to make the deficiency procedure apply to such additions, *it did so expressly.*

No such provision is made for the additions in Sec. 294(d). It follows, that Congress did not intend that they should be enforceable in the manner of deficiencies. This corroborates the conclusion which follows from the definition of *deficiency,* which we now set forth.

c. Deficiency Notice Limited to Deficiencies in Tax.

In the 1939 Code deficiency notices are governed by Sec. 272(a) which provides in part:

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency *in respect to the tax* imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail". (Emphasis added.)

Conversely, if the Commissioner does *not* determine a deficiency in respect of the *tax,* he is *not authorized* to send out a deficiency notice. *A deficiency notice is not a legal method for collecting any claim other than those set forth in Sec. 272(a).*

The same conclusion follows from the language of 1939 Code Sec. 271(a)(1):

> "271. *Definition of deficiency.*
>
> (a) *In general.* As used in this chapter in respect of a tax imposed by this chapter, 'deficiency' means the amount by which *the tax* imposed by this chapter, exceeds the excess of—
>
> (1) the sum of (A) the amount shown as *the tax* by the taxpayer unop his return, if a return was made by a taxpayer and an amount was *shown as the tax* by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
>
> (2) the amount of rebates, as defined in subsection (h) (2), made" . . . (Emphasis, except headings, added.)

For other types of claims, other procedures are provided—generally an action in the U.S. District Court. (Cf. 1939 Code, Secs. 3740-45.)

We are not concerned in this case with the problem which would arise were there both an alleged deficiency in tax and a claim for addition under Sec. 294. In this case there is admittedly no deficiency in the tax itself; what is involved is exclusively the "additions" or "penalties" under Sec. 294(d)(1)(A) and Sec. 294(d)(2). A claim for this alone does not fall within the language of Sec. 272 (a) stating the circumstances under which a deficiency notice is authorized.

d. Answer to Opinion of Tax Court.

The Tax Court (p. 55) mentions this point but does not meet it. Its opinion discusses whether the Tax Court *acquires jurisdiction*—which has never been denied.

Of the authorities which it cites, the most important is *Ely & Walker Drygoods Co. v. U.S.,* 34 Fed. 429, *supra, which indirectly supports the petitioner.*

Of the Tax Court cases, *Herbert Eck,* 16 T.C. 511, arose under Sec. 293—already discussed.

As pointed out, the language of Sec. 293 differs from that of Sec. 294 in exactly this respect; and the fact that *Herbert Eck,* turns on this special language in Sec. 293 is a circumstance supporting petitioner in a case under Sec. 294.

E. C. Newsom, 22 T. C. 225 passed only on the question of whether the Tax Court acquires jurisdiction upon the filing of a petition. However, it goes on to discuss the nature of the "additions" under Sec. 294 (d) citing *Ely & Walker Dry Goods Co. v. U.S.,* 34 F. 2d 429, and *Schneider v. U.S.,* 119 Fed. 215, *overlooking the fact that they arose under earlier, differently worded statutes,* and that the difference in statutory language now turns the point in petitioner's favor.

Union Tel. Co. v. C.I.R., 51 B.T.A. 152 involves normal tax and undistributed profits tax; it did not involve penalties ("additions") at all. It turns on the Tax Court's lack of jurisdiction to review the *determination of an overassessment.*

Charles E. Myers, Jr., 28 T.C. 12, so far as it follows *E. C. Newsom,* 22 T.C. 225, in holding that the Tax Court has jurisdiction, adopts the discussion about the nature of the "additions", without noticing that the authorities cited do not support it.

2. Deficiency Notice Unavailable Under 1954 Code.

To cover the possibility that availability of a deficiency notice might be considered a procedural matter, governed by current statutes, we point out that on the facts of this case, a deficiency notice was no more available under the 1954 code than under the 1939 code. The authorization for deficiency notices in the 1954 code is found in section 6212(a) which is substantially the same as section 272(a) of the 1939 code:

> "6212. *Notice of deficiency.*
>
> (a) *In general*—If the secretary or his delegate determines that there is a deficiency *in respect of any tax* imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail." (Emphasis added.)

It is evident from these sections that neither the 1939 nor the 1954 code authorizes the sending of a deficiency notice *solely* for the "additions" to the tax ("penalties") set forth in 1939 Code Sec. 294.

3. Failure of Deficiency Notice to State Facts Authorizing Sending of Deficiency Notice Requires Judgment for Petitioner.

a. By filing a deficiency notice for the purpose of claiming an "addition" or penalty, the Commissioner

has mistaken his remedy. The deficiency notice filed in this case is without authority and of no legal effect. Since the deficiency notice does not state facts on the strength of which a deficiency may be assessed (1939 Code. Sec. 272 (c)) the ordinary procedure would be to dismiss it. Since, however, neither the 1939 Code (Sec. 1117) nor the Rules of the Tax Court seem to provide for such a decision, the proper judgment is judgment for the petitioner, without prejudice to the pursuit by respondent of any other remedy which may be available. The judgment should be reversed with directions to enter judgment for petitioner without prejudice, etc.

B. ANY OTHER CONSTRUCTION OF STATUTE WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

1. Statutes are to be construed to avoid serious constitutional questions, if possible.

Ullmann v. U.S., 350 U.S. 422, 433:

> "We agree with District Judge Weinfeld's interpretation of this section: 'The most that can be said for the legislative history is that it is on the whole inconclusive.
>
> Certainly, it contains nothing that requires the court to reject the construction which the statutory language clearly requires. Especially is this so where the construction contended for purports to raise a serious constitutional question as to the role of the judiciary under the doctrine of separation of powers. The Supreme Court has repeatedly warned "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a con-

> struction of the statute is fairly possible by which the question may be avoided''. Indeed, the Court has stated that words may be strained ''in the candid service of avoiding a serious constitutional doubt''. Here, there is no need to strain words. It requires neither torturing of language nor disregard of a clear legislative policy to avoid the constitutional questions advanced by the witness. Indeed, to reach the constitutional question would require straining of language. In such circumstances, the court's duty is plainly to avoid the constitutional question.' ''
>
> *Guessefeldt v. McGrath,* 342 U.S. 308, 317-18.

2. To give sections 272(a) and 294(d)(1)(A) and 294(d)(2) any but a literal construction would raise serious constitutional questions.

a. (1) First of all, attempting to enforce the ''additions'' under Secs. 294(a)(1)(A) and 294(d)(2) by deficiency notice subject only to a trial in the Tax Court, would involve denial of trial by jury. The deficiency notice in this case describes the sums claimed as ''penalties''. The statutory sections, while saying merely that the sums claimed shall be added to the tax, show clearly that the ''additions'' are *imposed on the basis of alleged fault.*

There is no trial by jury provided in the legal machinery beginning with the deficiency notice and running through the Tax Court. (For the purpose of the record, a written demand for jury trial was made in the present case (R. 16); it was denied by the Tax Court before trial.) This means that if the deficiency notice procedure is applicable, the govern-

ment would be seeking to enforce *a money claim based on alleged fault* without allowing a trial by jury at any stage. But the VIth Amendment guarantees trial by jury in all criminal cases, and the VIIth Amendment guarantees trial by jury in all civil causes at common law involving more than twenty dollars.

Whether the "additions" be civil or criminal, to enforce them without opportunity for a trial by jury is clearly in violation either of the VIth or of the VIIth Amendment (depending on whether the "additions" are considered civil or criminal). Cf. *U.S. v. Regan,* 232 U.S. 37, 44, quoting from *Hepner v. U.S.,* 213 U.S. 103, 115.

These payments claimed on the basis of fault are, of course, in a different category from a tax. As indicated above, by attempting to make such payments—for fault—"part of the tax", the provisions of the revenue acts of 1918 and 1921 were wide open to the constitutional objection that they attempted to enforce such payments without opportunity for a jury trial. The literal wording of the 1939 (and 1954) act avoids this difficulty—which may be one of the reasons for the change.

Nor is the situation improved by the alternative of paying the "additions" and suing for a refund in the District Court (assuming that such procedure is available where only an "addition" and no tax is involved).

If this were the only way of getting a jury trial, the right to a jury would be conditioned upon first paying in full the disputed sum claimed for a disputed

alleged fault. Such a condition would place an unconstitutional burden upon the right of trial by jury. The inadequacies and hardships of paying first and suing afterwards are set forth in *Flora v. U.S.,* 357 U.S. 63, 73-4.

Root v. L.S. & M.R.S. Co., 105 U.S. 189, 206:

> ". . . the 7th Amendment forbids any infringement of the right of trial by jury, as fixed by common law."

Town of Grand Chute v. Winegar, 82 U.S. 373, 375:

> "the right to a trial by jury is a great constitutional right, and it is only in exceptional cases and for specified causes that a party may be deprived of it."
>
> *McKeon v. Central Stamping Co.,* 264 F. 385, 387-90 (C.C.A. 3).

The English common law never made payment of the claim a prerequisite to a civil defendant's right to a jury trial. At the very least, any such requirement for the additions of Sec. 294 of the 1939 code *would raise serious constitutional questions.*

(2) The Tax Court (R. 56) dismisses this argument by citing *Erwin v. Granquist,* 253 F. 2d 26, and *Wickwire v. Reinecke,* 275 U.S. 101.

The first of these held only that, as a matter of substantive law, the XVIth Amendment authorizes the laying of estimated taxes.

Wickwire v. Reinecke, 275 U.S. 101, dealt with proceedings to *determine the amount of a tax;* not with

an adjudication of fault. Besides, the holding was in favor of the taxpayer.

b. (1) *Second,* Rule 32 of the Tax Court puts the burden of proof on the petitioner. There is authority that this cannot be done, even in the enforcement of a civil liability based upon fault. *Western & Atl. Ry. v. Henderson,* 279 U.S. 639. The same rule in criminal cases: *Tot v. U.S.,* 319 U.S. 463; *Manley v. Georgia,* 279 U.S. 1. While certain forms of the reversed burden of proof have been sustained (*Mobile, J. & K.C. R.R. v. Turnipseed,* 219 U.S. 35, distinguished in *W. & A.R.R. v. Henderson,* 279 U.S. 639, 643) the serious Constitutional question would remain. The statute must be construed to avoid it.

(2) The foregoing difficulty is aggravated by the fact that in assessing "additions" under 1939 Code Sec. 294(d) the Commissioner acts in the *dual capacity* of the executive officer bearing the responsibility of finding and collecting revenue, and a quasi-judge who has to make a judicial finding of fault. Many cases have held such double functions violative of due process of law. The point was raised before the United States Supreme Court but not decided in the case of *Tumey v. Ohio,* 273 U.S. 510, 71 L. Ed. 749. In that case the same official, acting as both judge and mayor, imposed fines for violations of the prohibition law. The defense claimed due process was violated both because of the conflict of official duties, and because of a personal conflict, the judge-mayor's salary being paid out of the fines imposed. The conviction was reversed upon the latter ground; the

question of incompatibility of official duties was not reached. It comes up in the present case, however. The argument of counsel is given in condensed form 71 L. Ed. 749, 750, as follows:

Tumey v. Ohio, 273 U.S. 510, 71 L. Ed. 749, 750:

> (Argument of Counsel) "The mayor who tried the instant case, was financially interested in his decision as executive head of the village and was operating his court as a commercial proposition for the purpose of making money for his village."

Of the cases cited in support of this proposition, the following are especially in point:

Pearce Atwood (1816), 13 Mass. 324, 340-41 (violation of Sunday laws; judge, taxpayer of town to whose special benefit fines accrued, held disqualified);

Nettleton's Appeal (1859), 28 Conn. 268 (judge, one of selectmen of town, having duty to administer property of incompetents, held disqualified to pass on application to appoint conservator for property of incompetent); the Court said (p. 271):

> "Selectmen are, for most purposes, the agents of the town and the guardians of its treasury, appointed (in the language of an ancient statute) 'to take care of and order its prudential affairs' as well as to inspect the conduct and management of all persons residing in it, with an especial reference to the protection of the town against liability for the maintenance of persons reduced to want.
>
> ". . . —It would be shocking to all our notions in regard to judicial dignity, impartiality and de-

> corum, to witness, in the same person, at the same time, the exercise of functions so incongruous and incompatible."

In the case at bar, *every finding of "willful neglect"* which the Commissioner makes *brings in added revenue,* and makes it less pressing for him to find revenue elsewhere. (1939 Code, 26 USC 3600; 1954 Code, 26 USC 7601.) The Commissioner and his deputies would thus be exposed to the temptation not only to collect revenue, but to create it. The same factors come into play which have been noted in cases of coerced confessions. As the United States Supreme Court said in *McNabb v. U.S.,* 318 U.S. 332, 87 L. Ed. 819 (pp. 344-826 n. 8):

> "'. . . An experienced civil officer observed, "There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes, than to go about in the sun hunting up evidence." This was a new view to me, but I have no doubt of its truth'. Sir Fitzjames Stephen, A History of the Criminal Law of England (1883) vol. 1, p. 442, note . . ."

So it is far easier to make charges of fault and then offer to compromise them than to go to work canvassing for legitimate sources of revenue.

It is true that in making claims based on fraud, the Commissioner makes a preliminary finding of fault. But such cases go into the Tax Court with the burden of proof on the Commissioner. (1954 Code, 26 USC 7454—we cite the 1954 Code, here as on a procedural

point.) As to the "additions" under Sec. 294(d) on the other hand, if the Commissioner's contentions be accepted, *the Commissioner acting in a dual capacity, makes a finding of fault, and then goes into the Tax Court with a presumption in his favor and the burden of proof on the taxpayer.* (Rule 32.)

All of these difficulties are avoided by simply taking the literal meaning of the statute, and holding the deficiency notice procedure inapplicable to the "additions" under Sec. 294(d) at least where the latter stand alone.

c. *Third.* Where payments claimed on the basis of alleged fault are the only thing involved, if the deficiency notice is treated as a determination rather than merely an accusation, it becomes an *ex parte,* executive determination of fault. If the "additions" claimed are criminal penalties, the deficiency notice would be an executive determination of guilt. Legislative determinations of guilt are explicitly forbidden as bills of attainder. (Const. Art. I, Sec. 9, cl. 3, this prohibition is not limited to strictly criminal cases, *U.S. v. Lovett,* 328 U.S. 303.) An *ex parte* executive determination either of guilt or of civil fault, would certainly be a denial of due process under the Vth Amendment. Even without attempting to decide the questions, the *serious constitutional issue* is evident.

d. The unconstitutionality of Tax Court Rule 32 as applied was raised before the Tax Court (R. 15, 22) and was *completely ignored by it.* (R. 56, 58.)

C. SUMMARY.

The literal meaning of the words used in the 1939 Act makes a deficiency notice inapplicable where the only claim is for the "additions" ("penalties") under Sec. 294 of that act. Serious constitutional questions would arise if the act were given any other construction.

Under these circumstances the correct interpretation is that the present claim is not one which may be enforced by a deficiency notice. The deficiency notice does not state facts which can be made the basis of liability in such a proceeding. Judgment should be reversed with direction to enter decision for the petitioner without prejudice to the pursuit by respondent of any other remedy which may be available. If this contention is sustained, it disposes of the case and other phases need not be considered.

II. TAX COURT ERRS AS MATTER OF LAW (AND FACT) IN HOLDING NON-FILING NOT DUE TO REASONABLE CAUSE.

The argument in this part of the brief is covered by the following points in the petition:

(R. 64) "(3) that under the authorities 'wilful neglect' requires a 'bad purpose'; that upon the present record as a matter of law no 'wilful neglect' is shown in the non-filing of estimated tax returns in the two final years of an eight-year period; that the Tax Court's finding to the contrary was unsupported by evidence and capricious; that its legal conclusion to the contrary was not supported by its own findings of

probative facts and therefore capricious. (*Helms Bakeries v. C.I.R.,* 236 F. 2d 3.)

(R. 67) "3. The evidence, as a matter of law, does not show wilful neglect, but on the contrary shows reasonable cause for non-filing of estimated tax returns for the years 1952 and 1953, and the Tax Court's finding to the contrary is arbitrary and capricious.

In this connection the following finding of the Tax Court shows a misreading of the testimony:

> 'In preparing his returns on Form 1040, petitioner used the instruction pamphlet, which usually accompanied the form, as a reference book where a reference to the instructions appeared on the face of Form 1040.'

The testimony is that reference to the instructions pamphlet was made whenever Form 1040 seemed to require further elucidation, not merely when Form 1040 referred to the instructions pamphlet. Besides, the instructions pamphlet always (not 'usually') accompanied Form 1040.

"4. The Tax Court's legal conclusion of 'wilful neglect' and failure to show reasonable cause is unsupported by its findings of probative facts."

Section 294(d)(1)(A) provides for "additions" to the tax for non-filing of estimated returns "unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect".

"Reasonable cause" and "willful neglect" are here set forth as opposites. In short, the statute penalizes

"willful neglect"—and "reasonable cause" is anything which negatives "willful neglect".

This construction is indicated by the recent Fifth Circuit decision in *Patchen v. Com'r,* 258 F. 2d 544, 552, holding that it was the intent of the statute to penalize willful failure to file estimated returns.

A. FACTS.

In addition to facts already set forth in the general statement of facts, it was found that "petitioner used the instruction pamphlet which usually accompanied the form, as a reference book . . ." (R. 54.) The finding continues by saying, "where a reference to the instructions appeared on the face of Form 1040". This last is an evident misreading of the testimony, which was that the instructions pamphlet was consulted whenever something in Form 1040 seemed to require explanation:

> (R. 34) ". . . That is, whenever anything seemed to require explanation on the face of Form 1040, I went to the reference pamphlet."

(Of course, the instructions pamphlet *always* accompanied Form 1040, not merely "usually", as the Tax Court says in its opinion.) The successive references to filing of an estimated return, appearing over the years in Form 1040 itself, are set forth in the appendix to this brief.

Thus the basic facts (found by the Tax Court itself, except for the above modification as to the use made of the instructions pamphlets) are as follows:

The instructions pamphlets for 1948 and 1949 *did not require the filing of both forms* (i.e., Form 1040 and the estimated tax return). This requirement was introduced in a press release issued March 13, 1950, and in the instructions pamphlet *for* 1950 (issued 1951). The 1950 instructions pamphlet states the requirement, not conspicuously as an innovation, but *in ordinary type in the middle of a paragraph on page 12.*

Throughout the years 1944-1953 petitioner's Forms 1040 always showed on their face that no estimated tax return had been filed, but the Commissioner never objected to this procedure *until 1955* when he made the present claim of "willful neglect" for non-filing for the years 1952 and 1953—*the last two years of a nine-year period.* There is no documentary evidence as to the instructions pamphlets for years *before* 1948. (In a subsequent section we discuss the question of laches arising from the government's destruction of these records.)

But there are only two possibilities with respect to these earlier instructions pamphlets—*either they stated that both forms had to be filed or they did not so state.*

1. If we first consider the view *contrary* to the petitioner's testimony, that the forms before 1948 so stated, then the forms followed a vacillating pattern; those of 1943-47 would have had the requirement, those of 1948 and 1949 did not, those of 1950 and after *restored* the requirement. *And all this without any change in the statute.*

If this is what happened, then the Commissioner was clearly vacillating, and *obviously was uncertain as to the true meaning of the statute.*

Any corresponding uncertainty of a private citizen would not be "willful neglect" under any normal meaning of the term (we discuss the legal significance, *infra*). This conclusion would be emphasized by the fact that the Commissioner *raised no objection whatever over a period of nine years.*

2. On the other hand, if, as petitioner testified (R. 43) none of the instructions pamphlets *before* that of 1950 required that both forms be filed, then the requirement in the 1950 pamphlet and after, was an *innovation.* Since (in this view) no such requirement had been made for the years 1943-1949 there are again only two possibilities: *either* the Commissioner forgot the point for seven years, *or* the Commissioner changed his administrative interpretation.

The press release of March 13, 1950 (Ex. 2, R. 46-48) takes the position that the requirement of filing both petitions was always in force. On its face, this is inconsistent with the contents of the instructions pamphlets, which were changed in this respect for 1950 (the 1950 pamphlet issued 1951). But the position taken in the press release undoubtedly determined the course which followed.

Having said that the requirement of both forms was nothing new, the Commissioner made no change whatsoever on the face of Form 1040, and *did not make the new requirement conspicuous as an innovation when it was first included in the 1950 pamphlet.*

Instead, with nothing on Form 1040 to indicate a change, the new requirement was tucked away obscurely in the 1950 and subsequent pamphlets. *There was the greatest possible opportunity to miss it.* Petitioner's overlooking it (contributed to by the way in which the various forms dealt with the point) may have been an oversight—it certainly was not willful neglect.

We now consider the rules of law which are relevant to the above conclusion. They are, that "willful neglect" imports a "bad purpose" and does not cover a simple omission; that officers of the government are presumed to know what they are doing, and that the acts of even minor officials are relevant in determining whether a private individual has been guilty of willful neglect.

We discuss these three points, but shall take the procedural ones first, and the substantive definition of "willful neglect" afterwards.

B. OFFICIAL ACTS ARE PRESUMED TO BE REGULARLY DONE AND OFFICIALS PRESUMED TO KNOW WHAT THEY ARE DOING.

Although it is found that over a nine-year period, petitioner's 1040 forms always showed on their face that no estimated tax return had been filed, the Tax Court holds:

> (R. 57-8) "Petitioner could not rely upon the failure of the revenue service to call this omission to his attention. . . . Any reasonable and prudent person would not rely upon an impression, but would consult the current law."

If the Commissioner had in fact changed his administrative interpretation, his earlier lack of objection would not have been any "failure" but would have been *the execution of the earlier interpretation.* Since the instructions pamphlets varied upon the identical questions, it is not clear what the Tax Court means by "current law". Consulting the *statute* would have led nowhere, since the Commissioner's own application of the statute was not uniform.

The Commissioner's position apparently is that the variations were themselves the result of an oversight, and that a private individual has no right to assume that the Commissioner's acts were intentional or done with knowledge of the facts. In addition, before the Tax Court, the Commissioner made the rather startling argument that the long absence of objection could not be considered as any approval of the method used, *because it was not shown that the Commissioner (or any deputy) had read the returns. (!)*

The answer to both of these propositions is that official acts are presumed to be regularly done; this presumption includes the presumption that governmental officers *have acted with knowledge of the relevant facts. So, if the Courts act upon that presumption, it cannot be willful neglect for a private citizen to do so.*

For the presumption that official acts are regularly performed, see the following cases:

U.S. v. Chemical Foundation (1926), 272 U.S. 1:

(pp. 14-15) "The presumption of regularity supports the official acts of public officers and, in the

absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties (cases). Under that presumption, *it will be taken that Mr. Polk acted upon knowledge of the material facts.*" (Italics added.)

Pan American Petroleum Co. v. U.S. (1927), 273 U.S. 456:

(p. 498) "Under the Act of June 4, 1920, it was his official duty to administer the oil reserves; he was not called as a witness, and it is not to be assumed that he was without knowledge of the disposition to be made of them or of the means employed to get storage facilities and fuel oil for the Navy. He is presumed to have had knowledge of what he signed; . . ."

Bank of U.S. v. Dandridge (1827), 25 U.S. 64, 69-70:

". . . The law . . . It presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, omnia preasumuntur rite et solemnitur esse acta, donec probetur in contrarium. Thus, it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; . . ."

Osborne v. Bank of U.S. (1824), 22 U.S. 738, 830 (the Court does not investigate to find out whether attorneys appearing before it really represent their respective clients, but assumes that official acts are being regularly performed).

Under these authorities the Courts presume that officials act regularly and with knowledge of what they are doing; they *could* but they *do not* make an investigation to check whether attorneys purporting to represent a client really do so.

The present case is merely one of a private citizen who has acted upon the same presumption.

First, there is the presumption that the Commissioner or his deputies are familiar with the obvious contents of the returns in their office,—*second,* there is the presumption that where no objection is made for some nine years, this is because the returns were in the proper form. The mere fact that additional investigation *could have* been made, does not, of itself, mean that there was any occasion for it.

It certainly cannot be "willful neglect" for a private citizen to act upon the same presumption which the Courts follow as a matter of law.

C. ACTS EVEN OF MINOR OFFICIALS ARE RELEVANT IN DETERMINING "WILLFUL NEGLECT" OF PRIVATE CITIZEN.

Before the Tax Court it was suggested, though not directly argued, that, in determining "reasonable cause" vs. "willful neglect" the Court could consider all facts except the acts of the Commissioner's deputies themselves.

But the United States Supreme Court is directly to the contrary. Acts and declarations even of minor officials are relevant in deciding whether there has been "willful neglect" or "reasonable cause". This is clear from the decision in *Heikinnen v. U.S.,* 355 U.S.

273, as well as from the earlier one of *Hessman v. Campbell,* 134 F.S. 416.

Heikinnen v. U.S., 355 U.S. 273, was an immigration case, but it was based on two tax cases. One of these was *U.S. v. Murdock,* 290 U.S. 389, which in turn is based on *Felton v. U.S.,* 96 U.S. 699, a civil action for a penalty under the internal revenue laws. In *Heikinnen v. U.S.,* the Supreme Court held the evidence of "willful failure" *insufficient as a matter of law*—largely on the basis of statements of minor officers:

> (pp. 276-7) "The Government argues that petitioner willfully failed to make timely application to Finland, or to some other country to receive him, and that if he had done so he might have been able to identify, within the time prescribed, a country to which he could go."
>
> (p. 279) "There can be no *willful* failure by a deportee, in the sense of § 20(c) to apply to and identify a country willing to receive him in the absence of evidence, or an inference permissible under the statute, of a 'bad purpose' or '(non-)' justifiable excuse; or the like. Cf. *United States v. Murdock,* 290 U.S. 389, 394; *Spies v. United States,* 317 U.S. 492, 497, 498. Inspector Maki had informed petitioner that his purpose, in procuring the 'passport data' on April 9, 1952, was to send it to the District Director at Chicago, where it 'would be considered . . . with a view towards . . . obtaining some travel document or other in this case'. Moreover, the letter of April 30, 1952, from the officer in charge of the Duluth office, told petitioner, in the plainest language, that the service was making the arrangements to

> effect his deportation and, when completed, he would be notified when and where to present himself for deportation. Surely petitioner was justified in relying upon the plain meaning of those simple words, and it cannot be said that he acted 'willfully'—i.e., with a 'bad purpose' or without 'justifiable excuse'—in doing so, until at least, they were in some way countermanded, which was never done within the prescribed period." (Court's italics.)

To the same effect is *Hessman v. Campbell,* 134 F.S. 416, 418, a tax case.

So in the present case, it was relevant to the issue of "reasonable cause" vs. "willful neglect" that (1) the instructions pamphlets before 1950 did not require the filing of both forms; (2) no change occurred in Form 1040; (3) the change in the 1950 pamphlet was obscure, on an inside page; (4) the Commissioner made no objection to the method used for a period of some nine years.

D. "WILLFUL NEGLECT" REQUIRES "BAD PURPOSE".

The foregoing quotation from *Heikinnen v. U.S.,* 355 U.S. 273, 279, includes the formula that "willful failure" requires a "bad purpose". It is necessary only to add the original language from *Felton v. U.S.,* 96 U.S. 699, 702:

> "Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it, or to omit to do it. 'The word "willfully" ', says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely

> "voluntarily", but with a bad purpose.' *Com. v. Kneeland,* 20 Pick. 220. 'It is frequently understood', says Bishop, 'as signifying an evil intent without justifiable excuse.' "

In *Felton v. U.S.,* 96 U.S. 699, the petitioner was in a less favorable position than here. Felton had acted *squarely contrary to the directions of the tax officials,* instead of following their implied directions.

The counterpart to the rule that "willful neglect" requires a bad purpose is that "reasonable cause" requires no more than ordinary business prudence. (*Hatfried Inc. v. C.I.R.,* 162 F. 2d 628, 635; *Orient Inv. & Fin. Co. v. C.I.R.,* 166 F. 2d 601, 603-4; *In re Fisk's Estate,* 203 F. 2d 358, 359.) The Tax Court brushed this argument aside. (R. 57.) But we have already shown that the presumption that public officers have regularly performed their duties *with knowledge of material facts,* is a presumption which the Courts follow as a matter of law. This is certainly not *less* than "ordinary business prudence" in private affairs.

E. ALTERNATIVELY CLEAR ERROR IN FACT.

We believe that under the foregoing authorities the finding of "willful neglect" is erroneous as a matter of law. If not, it is "clearly erroneous" as a matter of fact. On this theory, too, the judgment of the Tax Court would have to be reversed. (*Helms Bakeries v. C.I.R.,* 236 F. 2d 3, 9.)

III. TAX COURT UNCONSTITUTIONALLY PUT BURDEN OF PROOF ON PETITIONER.

This argument is covered by the following points in the petition:

R. 64) "(4) that, in any event, petitioner was denied due process of law in violation of the Vth Amendment to the United States Constitution in that the Tax Court measured the evidence on the present claim according to the inverted burden of proof provided for in Tax Court Rule 32."

It is also included in par. "2" on R. 66-7, already quoted, in connection with subdivision "I" of this brief.

Since the Tax Court refused to accept the contention that the deficiency-notice procedure does not apply to simple claims for the "additions" under Sec. 294(d), it was faced with the question whether it could constitutionally apply the inverted burden of proof of Tax Court Rule 32.

We have already presented the argument on this point as an aid to the statutory construction of 1939 Code Secs. 271, 272, 294(d). (Subdivision I-B of this brief, *supra.*) If this statutory construction is rejected, then the unconstitutionality of the inverted burden of proof as applied to *an adjudication of fault* (as distinguished from a determination of the amount of a tax) becomes an independent issue. This issue is one which was carefully framed in the Tax Court, and which the Tax Court blandly ignored. The Tax Court cites two cases involving determination of

the *amount of tax,* not adjudication of fault. (R. 56, citing *Wickwire v. Reinecke,* 275 U.S. 101, and *Welch v. Helvering,* 290 U.S. 111.) Without other or further discussion, it measures the evidence from the premise that petitioner had the burden of proof. (R. 56, 58.) Since the inverted burden of proof is a denial of due process in an adjudication of fault, the judgment must be reversed on this ground in any event. This point is especially important since the Tax Court made findings:

> (R. 54) "Petitioner was unable to recall how he found out how to use and compute his income under section 107, but thought he got such information from conversations with other attorneys who were familiar with such section"

and again:

> (R. 57) "Petitioner could not recall where he gained such impression [as to change in requirements]"

This relates to matters occurring 11 and 12 or 13 years before the trial. (The trial took place on October 3, 1957, R. 18; the first application of Sec. 107 was in 1946, R. 54; the year in which petitioner thought the requirements were changed was 1944, or 1945, R. 42, 53.) It is at least inferrable that the Tax Court considers these lacunae in recollection as evidence of neglect.

But the issue is, what actually happened, not what is remembered or forgotten from 11 to 13 years later. *If gaps in recollection are thought important, then the burden of proof becomes crucial.*

IV. COMMISSIONER'S PROCEEDING BARRED BY LACHES—DENIAL OF DUE PROCESS OF LAW.

The point that the Commissioner's proceeding is barred by laches amounting to denial of due process of law is covered by the following points in the petition:

(R. 65) "(6) that the Forms 1040 and accompanying instructions pamphlets for years preceding 1952 are relevant to the issue of 'good cause' versus 'wilful neglect'; that after having destroyed these documents as too old, the respondent denied due process of law to petitioner in violation of the Vth Amendment to the United States Constitution in pressing a claim on which it had destroyed relevant evidence; that for the same reasons respondent was guilty of laches which upon these facts operates against the government."

(R. 67-8) "6. The government having heretofore destroyed as too old, evidence which is relevant to the issues of this case deprives petitioner of due process of law by now pressing the claim; for which reason the government is barred by laches."

The Commissioner's office destroyed records antedating the statute of limitations. Petitioner attempted to get them but was told they had been destroyed. (Exhibit 10, R. 49-51.) The instructions pamphlet for 1948 was the earliest of these documents which either side was able to produce.

The instructions pamphlets for 1948 and 1949 showed that *in 1950 the Commissioner changed his instructions regarding the necessity of filing both*

Form 1040 and the estimated return. This was true although the Commissioner denied it. (Ex. 2, R. 46-48.)

The petitioner testified that he was informed that a similar change had taken place about 1944. (R. 33, 43.)

The Commissioner and the Tax Court take the position that this did not happen, and was merely an "impression" based on "rumor", which constituted mere "ignorance of the law". (R. 24, 57, 58.)

But just as much as the 1948-50 forms showed that (contrary to the Commissioner's contentions) the Commissioner had changed his instructions at that time, production of the 1943-1945 records may very well have shown that the practice had likewise been changed at this earlier period.

If so, petitioner would be shown to have acted not on "impression", "rumor" or in "ignorance of the law", but to have acted *according to the law as the Commissioner then administratively interpreted it.* Respondent, having itself destroyed the records, now claims a penalty based upon total discounting of petitioner's testimony that it had been announced in 1944 that filing of estimated tax returns was optional. The records themselves would tend to show whether that was true or not—just as the records immediately before and after 1950 tend to corroborate the point.

Due process of law encompasses the "traditional notions of fair play and substantial justice." (*Milliken v. Meyer,* 311 U.S. 457, 463; see also *Galvan v.*

Press, 347 U.S. 522, 530; *McDonald v. Mabee,* 243 U.S. 90, 91; *Holden v. Hardy,* 169 U.S. 366, 389.)

It is certainly not in accord with any "traditional notions of fair play and substantial justice" to permit a party to prosecute a claim after that same party has destroyed relevant evidence. This is all the more true where the relevant evidence has been destroyed because of lapse of time.

On the part of a private litigant such conduct would constitute laches. (Cf. *Whitney v. Fox,* 166 U.S. 637, 648; *Mackall v. Casilear,* 137 U.S. 556, 566; *Foster v. Mansfield C. & Lake M. R. Co.,* 146 U.S. 88, 100, all dealing with loss or destruction of evidence.) On the part of the government it is a kind of laches which the constitution enforces against the government. (Amendment V, U.S. Constitution, and cases cited *supra* on fundamentals of due process.)

(In criminal cases, lapse of time coupled with loss of evidence bars the government under the VIth Amendment independently of any statute of limitations. *U.S. v. Provoo,* 17 F.R.D. 183, 194, 203; aff'd, 350 U.S. 357. The constitutional provision in effect raises laches against the government.)

The Tax Court cites *U.S. v. Summerlin,* 310 U.S. 414, 416, as holding that the government is not subject to laches. But there the defense of laches did not also raise a constitutional issue. Laches as such may not run against the government; but it does so to the extent that is needed to satisfy requirements of due process of law.

V. THE TAX COURT ERRED IN FINDING SUBSTANTIAL UNDERESTIMATION AND ASSESSING DOUBLE PENALTIES.

The argument in this part of the brief is covered by the following points in the petition:

(R. 64-5) "5. The provisions of section 294(d)(2) of the 1939 Code are not cumulative to those of section 294(d)(1)(A) and do not apply to the present case at all and section 294(d)(2) does not apply at all to the non-filing of an estimated tax return."

(R. 67) "5. The provisions of Section 294(d)(2) of the 1939 Code are not cumulative to those of section 294(d)(1)(A) and do not apply to the present case at all."

A. NO SUBSTANTIAL UNDERESTIMATION WHERE REASONABLE CAUSE FOR NON-FILING.

"Substantial underestimation" connotes an affirmative act, and contains at least a suggestion of fraud. Whatever may be the situation where there is no reasonable cause for non-filing, there certainly cannot be said to be a "substantial underestimation" where there is good cause for the non-filing. Not even *Fuller v. Commissioner,* 20 TC 308, holds to the contrary.

Needless to say "substantial underestimation" does not, in the ordinary significance of words, mean an omission divorced from any affirmative act—i.e., simple non-filing. Nor is any such definition contained in the section giving special definitions for purposes of the 1939 Act—i.e., Sec. 22, and to a certain extent also Secs. 11 and 12.

Greater details together with authorities on this point will be given in the next section when we dis-

cuss the Commissioner's claim that section 294 gives cumulative remedies.

In short, when good cause is shown for non-filing, Sec. 294(d)(2) does not come into play at all. The penalty claimed for "substantial underestimation" falls along with the penalty claimed for non-filing.

B. SECTION 294 DOES NOT PROVIDE FOR DOUBLE PENALTIES.

The commissioner claims that where no estimated tax return is filed he can (in the absence of reasonable cause) impose two penalties for the same act: that where the statute has expressly imposed one penalty for non-filing, another penalty, imposed in terms for "substantial underestimation" also includes non-filing.

The Tax Court has assessed cumulative penalties under both Secs. 294(d)(1)(A) and 294(d)(2). Since petitioner denies "willful neglect" as a matter of law, two distinct questions arise.

If petitioner is sustained on objections to the charge of "willful neglect", then the question is whether an "addition" under Sec. 294(d)(2) *can stand alone.* (There are no authorities on this point.) This is the question discussed in subdivision "A", *supra.*

If, on the other hand, the first part of the appeal is not sustained, then there is the question whether Sec. 294(d) authorizes cumulative penalties for the same omission.

Since the decision of the Tax Court there have been three Court of Appeals decisions: *Acker v. C.I.R.,* 258 F. 2d 568 (cert. granted Jan. 19, 1959, 27 L.W. 3207);

Patchen v. C.I.R., 258 F. 2d 544 (C.A. 5); and *Hansen v. C.I.R.,* 259 F. 2d 585.

Of these the *Acker* case held against the double penalty; the *Patchen* and *Hansen* decisions upheld it.

Before discussing these cases, we shall make an independent analysis of the statute (none of the three opinions makes the analysis which follows).

1. General Principles of Construction.

a. On its face, Sec. 294 uses the phrases "failure to file" and "substantial underestimation" separately and with separate meanings. Since they are used separately in different subsections, they are assumed to be used in different senses. A statute is to be construed to give meaning to every one of its terms. (*U.S. v. Menasche,* 348 U.S. 528, 538; *Platt v. Union P.R. Co.,* 99 U.S. 48, 58-9.)

This view is reinforced by Sec. 22 of the 1939 act, which gives a list of special definitions. The ordinary meaning of "substantial underestimation" certainly is not a mere passive omission; but statutes can and sometimes do incorporate special definitions of terms which they use. *But section 22 contains no special definition* of the phrase "substantial underestimation". This corroborates the *prima facie* interpretation: "failure to file" and "substantial underestimation" have distinct meanings in section 294 and do not overlap.

b. *Fuller v. C.I.R.,* 20 T.C. 308, quotes a Congressional conference report to the effect that where no

estimated tax return is filed, the estimate will be taken to have been zero for purposes of Sec. 294(d)(2). (There is also a treasury regulation to the same effect, but, of course, the regulation cannot supply anything which is not in the statute. *U.S. v. Calamaro,* 354 U.S. 351, 358-9, 1 L. Ed. (2d) 1394, 1399-1400.)

The trouble with this item from the conference report is that it goes contrary to the ordinary meaning of the language of the statute in its final form. Where a statute has a well-defined meaning within its four corners, resort cannot be had to legislative committee reports to *contradict* that meaning.

> *Bate Refrigerating Co. v. Sulzberger,* 157 U.S. 41-46.

Helvering v. City Bank F.T. Co., 296 U.S. 85, 89:

> "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used."

McKenzie v. Hare, 239 U.S. 299, 308:

> "Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language; or rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been give more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others."

U.S. v. Shreveport Grain & C. Co., 287 U.S. 77, 83:

"In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. *They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms.*" (Emphasis added.)

U.S. v. Mo. Pac. Ry., 278 U.S. 269, 278:

"When doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative interest. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended *and in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.*" (Emphasis added.)

Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356:

"Much is said in the briefs concerning the reports of committees concerned with the enactment of this legislation, but the words of the act are plain, and their meaning is apparent, without the necessity of resorting to the extraneous and often unsatisfactory aid of such reports."

Penn. Ry. v. Int. Coal Mine Co., 230 U.S. 184, 199:

"But while they may be looked at to explain doubtful expressions, not even formal reports . . .

> can be resorted to for the purpose of construing a statute contrary to its plain meaning, or to make identical that which is radically different."
> *Caminetti v. U.S.,* 242 U.S. 470.

From these authorities it is clear (1) that the Conference committee report cannot be used to "construe" section 294 of the 1939 act, since (2) the section both on its face and in conjunction with section 22, shows that "failure to file" and "substantial underestimation" are two different things, and the act does not impose the penalties for both on one alone. Here, where non-filing is claimed, it was error also to impose a penalty for supposed "substantial underestimation."

2. Decided cases.

None of the decided cases considers either the effect of the list of special definitions conformed in Sec. 22, nor the principle that outside aids to construction are impermissible except in case of ambiguity. Nor does any of the three cases consider the effect of *U.S. v. Calamaro,* 354 U.S. 351. Even with these limitations, the Sixth Circuit held the provisions not cumulative. (*Acker v. C.I.R.,* 258 F. 2d 568.)

Hansen v. C.I.R., 258 F. 2d 585, was a decision of the Ninth Circuit, before Judges Pope, Barnes, Hamley. The opinion is written by Judge Barnes. With all due respect to the learned panel, this opinion bases its holdings upon wholly unsound considerations.

The *first* is the same conference report used in the *Fuller* case, *supra.* We have already shown that the

statute has a definitely ascertainable meaning within its four corners, in which event no resort may be had to conference reports to change that meaning.

Secondly, the panel points to the circumstance that the 1954 Internal Revenue Act explicitly makes the two sections *non* cumulative. This is thought to show that the 1939 act must have been cumulative.

But that indicates a failure to think the problem through.

The 1954 act cannot give the 1939 act any different meaning from what the 1939 act had when it was passed. The later act is at best an extrinsic aid to construction. It may be used under the same circumstances and to the same extent as any other extrinsic aid to construction. That is to say, it may be used, if at all, to clear up an ambiguity where the meaning of the statute cannot be determined from its four corners. But, as we have already seen, Sec. 294(d) taken together with Sec. 22, has a definitely ascertainable meaning within its four corners. (As also already noted, Sec. 22 is overlooked by all the opinions.) Since Sec. 294(d) has a definitely ascertainable meaning, extrinsic aids to construction are inadmissible. This includes the subsequent statute. (The 1954 amendment showed merely that Congress disapproved the Commissioner's administration of the 1939 Act.)

Patchen v. C.I.R., 258 F. 2d 544 (C.A. 5), likewise makes an incomplete analysis. Pointing out that willful underestimation is penalized regardless of excuse, while non-filing is excused by reasonable cause, it says:

> (p. 552) "This imports that this is expected to be an additional sanction for those who without justification, fail to file a declaration or pay."

This wholly overlooks the aspect that under this construction, Sec. 294(d) may be held to impose an independent penalty *even where the non-filing is found to be excused by reasonable cause.* Conversely, it means that Sec. 294(d)(1)(A) *could never stand alone*—which runs counter to the framework of the section, which makes 294(d)(1)(A) a subdivision of 294(d)(1) and not a subdivision of 294(d)(2).

The *Patchen* opinion also says:

> (p. 552) "And more important, it might have recognized that those whose willful non-excusable acts prevented the effective operation of the scheme of self-assessment and current payment, ought to bear some additional disadvantage over the person whose arithmetic or prognostication was merely faulty."

This we submit misconstrues 294(d)(2) and again incompletely considers 294(d)(1)(A).

The above passage misconstrues 294(d)(2) because the ordinary meaning of "underestimation" is not an arithmetical error. Again, under the ordinary meaning of the terms, the requirement that the underestimation be "substantial", eliminates the cases where the prognostication is "merely" faulty.

The above passage incompletely considers 294(d)(1)(A) because it does not even discuss the situation where non-filing is held *excusable,* but where (under

the Commissioner's contention) a penalty would nonetheless be exacted under 294(d)(2) which does not mention non-filing at all.

3. **Summary.**

The ordinary meaning of the language of Secs. 294(d)(1)(A) and 294(d)(2) coupled with the special definitions given in section 22, shows that sections 294(d)(1)(A) and 294(d)(2) are meant to apply to distinct situations, and are not intended to overlap. Since they do not overlap, they cannot be applied cumulatively to the same act or omission.

VI. AT MOST COMMISSIONER CAN RECOVER ONLY $48.97.

The point that $48.97 is the maximum recovery if any at all is possible is presented at the following part of the petition: (R. 65) "(7) that respondent cannot consistently with due process of law under the Vth Amendment to the United States Constitution, increase its claim by its own delay, and it is limited at most to the amount which it could have recovered if it had acted immediately, to-wit, $48.97."

(R. 68) "7. The government cannot, consistently with due process increase its claim by its own delay; hence it is at most limited to what it might have recovered, if it had acted promptly, to-wit, $48.97."

The Commissioner did not oppose this contention in the Tax Court. The Tax Court ignored it.

Petitioner's returns previous to 1949 were no longer in existence, which fact is part of the defense of

laches. (Ex. 4, R. 36.) If, however, the matter of laches be disregarded, the Commissioner cannot recover more than he could have gotten had he acted promptly. Since the earliest year of which there is any record is 1949, the most which the Commissioner may recover is what he could have recovered had he made the claim for the year 1949. And, in accordance with what has already been said in subdivision V, *supra,* this is only what might have been recovered under Sec. 294(d)(1)(A).

The reason why the government is limited to what it might have recovered had it made its claim in 1949 is that *it cannot profit by its own delay.* Had a demand for filing estimated tax returns been made, they would, of course, have been filed in succeeding years. The only year for which a penalty could possibly have been collected would have been the first year for which the demand was made. There would have been occasion neither for claiming penalties *for more years than one,* nor for any subsequent *higher* year than 1949!

This is so because, for the government to profit by its own delay, is taking property without due process of law. Due process of law includes, among other things, the elementary rules of fair play; it has long been held an elementary principle of fairness that a claimant cannot increase the amount of his claim by his own acts or delay.

The amount which could be claimed under Sec. 294 (d)(1)(A) on petitioner's 1949 income is $48.97. (See Exhibit 4, R. 36, which includes the petitioner's 1949 return.)

Authorities holding (A) that due process comprises elementary rules of fairness and (B) that it is an elementary rule of fairness that a claimant cannot increase the amount of his claim by his own acts of delay are as follows:

A. FUNDAMENTAL JUSTICE AND FAIRPLAY PART OF DUE PROCESS.

The fundamentals of justice and fairplay are part of due process. Compare the following cases:

Milliken v. Meyer, 311 U.S. 457, 463:

> "The traditional notions of fairplay and substantial justice implicit in due process . . ."

Galvan v. Press, 347 U.S. 522, 530:

> "fairplay—which is the essence of due process".

McDonald v. Mabee, 243 U.S. 90, 91:

> "Subject to its conception of sovereignty, even the common law required a judgment not to be contrary to natural justice."

Holden v. Hardy, 169 U.S. 366, 389.

B. FUNDAMENTAL PRINCIPLE THAT CLAIMANT CANNOT ENHANCE AMOUNT OF OWN CLAIM.

The fundamental nature of the rule that the plaintiff cannot run up his own damages is expressed in the following cases:

Ed. S. Michelson Inc. v. Nebraska T&R Co., 63 F. 2d 597, 601 (CCA 8):

> "Such damages, unless punitive in character, are confined to compensation and the law does not contemplate that the party recovering for breach of a contract should be better off because of the

breach than he would have been had the contract been carried out according to its terms. Defendants market on resale was not dependent upon the market price, but was a price fixed by contract and *it would be against all justice to permit it to make a profit by the breach of this contract,* to be compensated for a loss it never suffered, and to be placed, not in the same position in which it would have been if the contract had been performed, but, in a much better position." (Emphasis added.)

Bear Cat Mining Co. v. Graselli Chemical Co., 247 F. 266 (CCA 8) (p. 288):

' "*Public interest and sound morality accord* with the law in demanding this; and if the injured party through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls on him."'

Pasquel v. Owen, 186 F. 2d 263 (CA 8) (p. 273): "Damages generally must be limited to compensation . . . and it was defendant's duty to exercise reasonable diligence to minimize damages and in no event should a party to a contract be permitted to profit by its breach."

The United States Supreme Court has confirmed this principle in cases like, *C. & O. v. Kelly,* 241 U.S. 483, 489; *U. S. v. Smith,* 94 U.S. 214, 218.

Since $48.97 is all that the Commissioner would have recovered had be acted on the 1949 return, it is all that he can recover now.

CONCLUSION.

We submit that the technically correct disposition of this case is to hold that the deficiency notice procedure does not cover situations, where, as here, there is a claim only for "additions" under 1939 Code Sec. 294(d), and no claim of deficiency in the tax itself. In effect, the deficiency notice does not state facts constituting a cause of action. Accordingly, the judgment of the Tax Court should be reversed with directions to enter a decision for petitioner, without prejudice to any other remedy which the Commissioner may wish to pursue.

Alternative grounds for reversal have also been stated.

Dated, San Francisco, California,
February 17, 1959.

Respectfully submitted,
GEORGE OLSHAUSEN,
Petitioner.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

13. Through and including Form 1040 for the year 1949, the only reference to estimated tax returns in such forms reads as follows:

(1944)

"7. How much have you paid on your 1944 income tax?

(A) By withholding from your wages (attach withholding Receipts, Form W-2)

(B) By payments on 1944 Declaration of Estimated Tax

"8. If your tax (item 6) is larger than payments (item 7) enter *Balance of Tax Due* here.

"9. If your payments (item 7) are larger than your tax (item 6), enter the *Overpayment* here.

"check ( ) whether you want this overpayment: Refunded to you .....; or ..... Audited on your 1945 estimated tax .....

(1945)

"7. How much have you paid on your 1945 income tax?

(A) By withholding from your wages

(B) By payments on 1945 Declaration of Estimated Tax"

(Items "8" and "9" same as on 1944 Form, except for date)

(1946) (Same as on 1945 form, except for dates, and except that the three items are now numbered "8", "9" and "10" respectively)

(1947) (Same as in 1946, except for dates)

(1948)

"8. How much have you paid on your 1948 income tax?

(A) Total tax in item 2, above (attach Original Forms W-2)

(B) By payments on 1948 Declaration of Estimated Tax.

(Items "9" and "10" same as in 1947 except for dates)

(1949)

"8. How much have you paid on your 1949 income tax?

(A) By tax withheld (in item 2, above) Attach Original Forms W-2.

(B) By payments on 1949 Declaration of Estimated Tax.

"9. If your tax (item 7) is larger than payments (item 8), enter *Balance of Tax Due* here.

This balance of tax must be paid in full with return.

"10. If your payments (items) are larger than your tax (item 7), enter the *overpayment* here.

Check ☒ whether you want this overpayment: Refunded to you ☐; or Credited on your 1950 estimated tax ☐

Do you owe any prior year Federal tax for which you have been billed? .....
(yes or no)

14. The only reference to estimated tax returns on Form 1040 for the taxable year 1950 reads as follows:

"6. How much have you paid on your 1950 income tax?

(A) By tax withheld (in item 2, above). Attach Original Forms W-2.

(B) By payments on 1950 Declaration of Estimated Tax.

"7. If your tax (item 5) is larger than payments (item 6) enter *Balance of Tax Due* here.
This balance of tax due must be paid in full with return

"8. If your payments (item 6) are larger than your tax (item 5), enter the *overpayment here.*

Enter amount of item 8 you want:
Refunded to you $.....
Credited on your 1951 estimated tax $.....

"Do you owe any prior year Federal tax for which you have been billed: .....
(yes or no)

15. The only references to estimated tax returns on Forms 1040 for the years 1951, 1952 and 1953 read respectively as follows:

(1951)

"6. How much have you paid on your 1951 income tax?

(A) By tax withheld (in item 2, above). Attach Original Forms W-2.

(B) By payments on 1951 Declaration of Estimated Tax (include any overpayments on your 1950 tax not claimed as a refund).

"7. If your tax (item 5) is larger than payments (item 6), enter *balance of tax due* here. This balance must be paid in full with return.

"8. If your payments (item 6) are larger than your tax (item 5) enter the *overpayment* here.

"Enter amount of item 8 you want $..... refunded

$..... credited on 1952 estimated tax.

(1952) (Same as in 1951 except as to dates)

(1953) (Same as in 1952 except as to dates)

16. The only references to estimated tax in the Form 1040 for the taxable year 1954 reads as follows:

"12. Credits for amounts paid on your 1954 income tax:

A. Tax withheld (in item 2, Column D above) Attach Forms W-2.

B. Payments on 1954 Declaration of estimated Tax, Indicate District Director's Office where paid.

"13. If your tax (item 11) is larger than payments (item 12), the balance must be paid in full with return. *Enter such balance here.*"

"14. If your payments (item 12) are larger than your tax (item 11) *Enter the Overpayment here.*"

Appendix B

INDEX OF EXHIBITS BROUGHT UP AS ORIGINALS

Exhibit 1	90-day letter	R 21 (printed at R 6-9)
Exhibit 2	press release	R 31 (printed at R 46-48)
Exhibit 3	bill for $10.25 and covering check for taxable year 1951	R 35
Exhibit 4	Petitioner's Income Tax Returns (Form 1040) 1949-53, both inclusive	R 36
Exhibit 5	Blank Forms 1040— 1943-44-45-46-47-48-49-51	R 36
Exhibit 6	Instruction Pamphlets Accompanying Form 1040 1948-50, both inclusive	R 37
Exhibit 7	Petitioner's Form 1040 Return for 1954	R 37
Exhibit 8	Bill and previous check for estimated tax 1956	R 38
Exhibit 9	Bill, previous check and letter concerning estimated tax 1957	R 39
Exhibit 10	letters in response to requests for documents	(printed at R 49-51)